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No. 90-275

In The

Supreme Court of the United States

October Term, 1990

MARY FRANCO,

Petitioner,

v.

AMERICAN GAS ASSOCIATION LABORATORIES, PACIFIC COAST BRANCH; AMERICAN GAS ASSOCIATION EMPLOYEES' UNION OF THE AMERICAN GAS ASSOCIATION LABORATORIES, PACIFIC COAST BRANCH,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. WHETHER THE NINTH CIRCUIT COURT OF APPEALS APPROPRIATELY CONCLUDED THAT PETITIONER MARY FRANCO'S EMPLOYMENT-RELATED CLAIMS AGAINST HER EMPLOYER AND HER UNION WERE PREEMPTED BY SECTION 301 OF THE LABOR MANAGEMENT RELATIONS ACT AND SECTION 8(a)(2) OF THE NATIONAL LABOR RELATIONS ACT?

2. WHETHER THE NINTH CIRCUIT COURT OF APPEALS CORRECTLY DETERMINED THAT PETITIONER MARY FRANCO'S ALLEGATION OF MENTAL INCAPACITY DURING THE LIMITATIONS PERIOD OF SECTION 301 OF THE LABOR MANAGEMENT RELATIONS ACT DID NOT TOLL THAT LIMITATIONS PERIOD BECAUSE HER RETENTION OF COUNSEL DURING THAT PERIOD PROVIDED HER WITH THE "MEANS TO KNOWLEDGE"?

3. WHETHER THE NINTH CIRCUIT COURT OF APPEALS' FACTUAL DETERMINATION THAT, "FRANCO'S CLAIM [FOR RETIREMENT BENEFITS] WAS NOT IGNORED NOR DENIED", AND THAT PETITIONER FAILED TO RESPOND TO AN INQUIRY REQUESTING INFORMATION NEEDED TO PROCESS HER RETIREMENT BENEFIT CLAIM SHOULD RENDER CONSIDERATION IN THIS COURT OF PETITIONER'S "EXHAUSTION OF REMEDIES" ARGUMENT UNNECESSARY?

QUESTIONS PRESENTED – Continued

4. WHETHER THE NINTH CIRCUIT COURT OF APPEALS PROPERLY CONCLUDED THAT PETITIONER'S CORPORATE EMPLOYER, AMERICAN GAS ASSOCIATION, IS NOT A FIDUCIARY OF THE RETIREMENT PLAN BECAUSE IT IS A SEPARATE ENTITY FROM THE RETIREMENT COMMITTEE DESIGNATED BY THE PLAN DOCUMENTS AS THE PLAN ADMINISTRATOR, AND IT IS NEITHER THE TRUSTEE, THE INVESTMENT MANAGER NOR THE PLAN ACTUARY?

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MARY FRANCO,

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v.

AMERICAN GAS ASSOCIATION LABORATORIES, PACIFIC COAST BRANCH; AMERICAN GAS ASSOCIATION EMPLOYEES' UNION OF THE AMERICAN GAS ASSOCIATION LABORATORIES, PACIFIC COAST BRANCH,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

Respondent American Gas Association respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Ninth Circuit's opinion in this case.

The tentative ruling of the District Court is not reported, and is reprinted in the Petition as Appendix A. The tentative ruling is not reproduced herein other than

to correct typographical errors, said corrections set forth in Appendix 1 herein. The Memorandum of Decision and Order of the District Court is not reported, and is reprinted in the Petition as Appendix B. The Memorandum is not reproduced herein other than to correct typographical errors, said corrections set forth in Appendix 2 herein. The opinion of the Court of Appeals for the Ninth Circuit is not reported, and is reprinted in the Petition as Appendix C. The opinion is not reproduced herein.

STATEMENT OF THE CASE

A. Nature Of The Case

Petitioner Mary Franco was employed by Respondent American Gas Association ("AGA") in its testing laboratory in Los Angeles, California and was a union member. Petitioner began her employment in 1951 and was employed until her retirement on July 1, 1984. Petitioner's 70th birthday occurred in March, 1984. In 1957, Petitioner was asked if she wished to participate in AGA's Retirement Plan, and declined in writing to do so.

On February 9, 1984, Petitioner left her place of employment, stating she had had an accident. Thereafter, despite repeated attempts by employees of AGA both orally and in writing to contact her, Petitioner was not directly heard from again. On July 1, 1984, AGA retired Petitioner and commenced her retirement benefits thereafter.

On September 5, 1984, AGA received a letter from Ronald Dean, Esq., which letter stated in relevant part:

> "I have been retained to represent Mary Franco and to assist her in understanding the employee benefits currently available to her, and to assure her that the benefits offered are indeed the benefits to which she is entitled."

AGA responded, providing the information requested.

On October 15, 1985, AGA received a letter from the law firm of LeMaire and Faunce. That letter stated in relevant part:

> "Could you please advise us what the current status is with respect to the various benefits and insurance programs which Mary Franco had with your company."

Again, AGA provided all the information requested.

Finally, in November, 1986, AGA received correspondence from Petitioner's third attorney, Dale M. Fiola, Esq., her present counsel, inquiring about her various employment benefits. AGA, for the third time, complied with the Petitioner's request for information and materials. After an exchange of correspondence, AGA requested certain information from Petitioner so it could be absolutely sure no mistake had been made regarding provision of her various benefits. Petitioner never responded to that request for information; rather, in May, 1987, she filed her first complaint.

AGA has been and is providing all of Petitioner's retirement and other benefits.

B. The Initial Proceedings

On May 11, 1987, Petitioner filed her original Complaint in the United States District Court for the Central

District of California against AGA and her union, "American Gas Association Employees' Union of the American Gas Association Laboratories, Pacific Coast Branch"[1]. Petitioner's Complaint contained causes of action for: (1) unlawful discharge in breach of the union's duty of fair representation; (2) for employee benefits under a collective bargaining agreement; (3) fraud and deceit; (4) unfair labor practices; (5) breach of written contract; (6) breach of fiduciary duty; and (7) breach of fiduciary duty under ERISA. Petitioner alleged in the opening paragraph of her Complaint that she was bringing the action under Section 301 of the Labor Management Relations Act, and attached as an exhibit a copy of the relevant collective bargaining agreement which existed between AGA and her union.

AGA filed a Motion to Dismiss or in the Alternative Motion for Summary Judgment, which motion primarily focused on Petitioner's failure to pursue her claims within the six-month statute of limitations period mandated by this Court in *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 161, 103 S.Ct. 2281 (1983). Petitioner's opposition consisted primarily of an argument that, because of Petitioner's claimed mental incapacity, the six-month statute of limitations should be tolled, relying primarily on her concept of state law regarding tolling. The Honorable Pamela A. Rymer, United States District Court Judge, held the limitations period not to be tolled and dismissed six of the seven causes of action alleged in the Complaint. Judge Rymer instructed the

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[1] Although named as a party defendant, her union was never served.

parties to attempt to administratively resolve the remaining ERISA claim.

Although the ERISA claim survived, Petitioner filed a First Amended Complaint containing ERISA claims, in which she named as an additional party defendant the American Gas Association Retirement Committee ("AGARC").

Petitioner then subsequently filed in state court a complaint which set forth essentially the same claims against AGA which had been dismissed by Judge Rymer.

AGA removed Petitioner's state court complaint to federal court and filed a Motion to Dismiss; it also moved to dismiss plaintiff's First Amended Complaint. Petitioner filed a motion to remand her removed state court action. All these matters were consolidated and heard by Judge Rymer on April 25, 1988. On August 8, 1988, Judge Rymer granted AGA's motions, dismissing the First Amended Complaint against AGA and dismissing the removed state court complaint in its entirety.

C. The Appeal

Several appeals were filed by Petitioner at various stages during the pendency of this matter before the District Court. The first appeal was filed on November 13, 1987, following the District Court's rulings concerning Petitioner's original complaint. On September 6, 1988, Petitioner filed a second notice of appeal regarding the dismissal of her amended and state court complaints. Thereafter, it was stipulated between counsel for the parties that Petitioner would dismiss with prejudice her one

remaining claim, under ERISA, against AGARC so as to perfect her appeal. Following this dismissal, Petitioner filed notice of a third appeal.

The three appeals were consolidated and argued before the Ninth Circuit on March 7, 1990.

On May 14, 1990, the Ninth Circuit issued its opinion affirming the District Court's orders dismissing the Petitioner's complaints. The Court of Appeals found that Petitioner's various claims against AGA were preempted by Section 301. It held that her claim that the applicable six-month limitations period was tolled failed because, whether or not she was in fact mentally incapacitated, her retention of counsel provided her with the "means to knowledge" that she must file any claim within the period, in accordance with its decision in *Stallcop v. Kaiser Foundation Hospitals*, 820 F.2d 1044 (9th Cir. 1987), *cert. denied*, 484 U.S. 986 (1987). The Court of Appeals found Petitioner's ERISA claims were barred because she had failed to exhaust her administrative remedies under the subject Retirement Plan. The Court further found that AGA was not a fiduciary within the meaning of ERISA.

D. The Petition For Writ Of Certiorari

This Petition for Writ of Certiorari attempts to invoke this Court's jurisdiction by misstating the facts and the law. Specifically, Petitioner claims this Court has not "formally ruled upon" the issue of the borrowing of tolling provisions from state law in the context of Section 301 actions (Pet., pp. 17-18). This Court has so essentially ruled. Petitioner further claims that the Ninth Circuit has rendered a decision which is in conflict with a state court

of last resort (Pet., p. 18). The Ninth Circuit's decision is not in conflict with any decision of the California Supreme Court, which AGA assumes is the "state court of last resort" Petitioner is referring to.

Finally, Petitioner has misstated the factual predicate to her argument that the statute of limitations should be tolled. Simply stated, there was no credible evidence presented to either the District Court or the Court of Appeals that Petitioner is mentally incapacitated. Rather, what the evidence does show is that Petitioner retained counsel during the limitations period to represent her concerning the issues involved in this case.

REASONS WHY THE PETITION SHOULD BE DENIED

1. Petitioner's Claims Are Preempted By Section 301 Of The Labor Management Relations Act.

Petitioner asserts that several of her claims against AGA and her union are not preempted by Section 301 of the Labor Management Relations Act (29 U.S.C. Section 185) ("Section 301"). The short, yet complete, response to this was rendered by Judge Rymer in her Memorandum Decision and Order dismissing Petitioner's claims, set forth at page B-20 of the Petition: "[Petitioner] admits that her claims depend on a finding that 'in fact there was no union in place and the collective bargaining agreement in essence was a sham'. *Id. This type of claim seems to be almost a paradigm example of a hybrid Section 301 case.* (emphasis added)." In so stating, Judge Rymer was following the teaching of this Court in *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 108 S.Ct. 1877 (1988), which

mandates Section 301 preemption of any state law claim which requires the interpretation of a term of a collective bargaining agreement for resolution.[2]

AGA respectfully submits the Court of Appeals' decision, which also applied well-established federal labor law principles to dismiss Petitioner's claims, was correctly decided and does not warrant the exercise of a grant of certiorari.

II. Contrary To Petitioner's Assertion, The Court Of Appeals' Decision Is Not In Conflict With That Of A State Court Of Last Resort.

Rule 10.1(a) of this Court's Rules states that a sufficiently special and important reason for granting certiorari may occur when a United States Court of Appeals has decided a federal question in a way in conflict with a state court of last resort. Petitioner appears to be claiming such a reason exists with respect to the issue of the application of tolling provisions under state law to federal statutes of limitations. This simply is not the case. There is not cited by Petitioner in her Petition any California Supreme Court decision on this issue. Evidently, the decision which Petitioner is relying on is *Pearl v. Pearl*, 177 Cal. 303, 177 P. 845 (1918). However, this decision involving a plaintiff *found* to be mentally incapacitated, stands for the proposition that California Code of Civil Procedure Section 352 means what it says – certain *state*

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[2] The Court of Appeals' determination of the preemptive effect of Section 301 on Petitioner's state court complaint was based on well-established federal labor law principles and disposes of her remand arguments.

statutes of limitations are tolled for the period of time that a plaintiff is insane. Section 10(b) of the National Labor Relations Act (29 U.S.C. 160(b)), the *federal* statute of limitations at issue herein, is not discussed in *Pearl v. Pearl, supra.*

Reaching its conclusion that the limitations period was not tolled, the Court of Appeals herein was applying well established *federal* common law tolling principles to a *federal* statute of limitations. Specifically, the Court of Appeals applied the "means to knowledge" test it had fashioned in *Stallcop v. Kaiser Foundation Hospitals, supra,* a case in which the plaintiff was also urging the tolling of Section 10(b)'s limitations period. As in *Stallcop, supra,* the Court of Appeals herein found that Petitioner's retention of counsel during the limitations period obligated her to take some action within that period. There is no relationship, much less a conflict, between the Court of Appeal's decision in *Stallcop* and herein, and the California Supreme Court's decision in *Pearl v. Pearl, supra.* Accordingly, AGA respectfully submits that Petitioner's argument on this point provides no basis warranting this Court's exercise of its certiorari jurisdiction.

III. The Tests To Be Applied For The Application Of Tolling In Section 301 Actions Implied In This Court's Decision Of *DelCostello v. International Brotherhood Of Teamsters* Have Been Followed By The Federal Courts.

Petitioner claims this Court has not "formally" decided whether state tolling provisions should be applied to the six-month limitations period of Section 301 actions. If Petitioner is asserting that this Court has not

determined this issue and instructed lower courts regarding the principles to be applied, Petitioner is incorrect.

After holding in *DelCostello, supra,* that Section 10(b)'s limitations period applies to Section 301 actions, this Court noted that one of the cases before it may have involved a tolling issue and remanded that case to the appropriate district court for further proceedings consistent with its opinion. *DelCostello, supra,* at p. 172. In the subsequent decision, *DelCostello v. International Brotherhood of Teamsters,* 588 F.Supp. 902 (D. Md. 1984), *aff'd,* 762 F.2d 1219 (4th Cir. 1985) the district court, in finding that the claim was not tolled, stated at p. 907: "The question of when a federal cause of action 'accrues' and the related question of whether it is 'tolled' by subsequent conduct or events *are federal questions determined by federal law.* [Citations omitted]." (emphasis added)

In so stating, the district court underscored this Court's holding that this issue is one of federal law, which holding makes state tolling provisions irrelevant. Numerous subsequent decisions, including *Stallcop, supra,* are in accord. The courts have perceived the chaos which would result if fifty different state tolling provisions were applied to the uniform federal limitations period under Section 301. AGA therefore respectfully submits that Petitioner's claim that this Court has failed to "formally" rule on this issue does not constitute a special or important reason which would warrant the granting of certiorari.

IV. There Is No Credible Evidence Which Substantiates Petitioner's Claims Of Mental Incapacity.

Petitioner's claim that she has been mentally incapacitated since 1984 is one which obviously invokes the

sympathy of everyone involved in this matter, not least that of AGA and its employees, many of whom attempted to contact Petitioner and inquire as to her condition. Such feelings of sympathy, however, often imbue legal disputes with an importance they otherwise would not have.

AGA raises this point only because there is no credible evidence which substantiates Petitioner's claim that she had been mentally incapacitated, and therefore unable to protect her rights. Indeed, in August, 1987, Petitioner submitted a declaration signed under penalty of perjury in opposition to AGA's Motion to Dismiss. This declaration set forth in great detail Petitioner's reasons for taking various steps concerning her claims since 1984, including her retention of her two prior attorneys. Such a declaration is, to say the least, inconsistent with a claim of mental incapacity.

Under these circumstances, AGA respectfully submits that the legal issues involved in the Petition, in addition to having been decided correctly below, simply are not important enough to warrant an investment of this Court's resources.

V. Petitioner Has Failed To Assert Any Grounds Under Rule 10 For Review Of The Conclusions Of The Courts Below Relating To Any Factual Or Legal Issues Under ERISA.

Petitioner has made no attempt to invoke this Court's jurisdiction under Rule 10 concerning her claims under ERISA. The Petition is bereft of any claim that the Court's decision below is in conflict with any other court of appeals, or any of the other recognized jurisdictional

bases for the granting of petitions for a writ of certiorari by this Court. Accordingly, AGA respectfully submits that the ERISA issues "raised" by Petitioner (encompassing the definition of "fiduciary", which is well-settled, and the findings of the courts below regarding Petitioner's failure to exhaust the administrative remedies of the Retirement Plan) do not warrant review by this Court.

VI. The Corporate Employer's Non-Fiduciary Status Is Based Upon Factual Findings By The District Court Which Have Been Reviewed And Adopted By The Court Of Appeals.

Petitioner asserts that "[i]t is patently evident that A.G.A. controls and manages the Plan and is a fiduciary under the definition of *29 U.S.C. Section 1002(21) (A).*" (Pet. p. 56). Petitioner's assertion is contrary to the findings of fact made by the District Court and adopted by the Court of Appeals.

Specifically, the District Court found (see Pet. App. B-4 to B-7):

- AGA established a Retirement Plan ("Plan") and Petitioner is a beneficiary;
- "Under the terms of the Plan, [AGA] is the 'Employer' ";
- **AGARC is the "Plan Administrator";**
- The Plan provides that the president of AGA is Chairman of AGARC and other members of AGARC are appointed by AGA's Board of Directors;

- "According to the Plan, [AGARC] determines the payment of benefits and hears appeals of denied claims";
- "The Trustee is the fiduciary responsible for the Plan assets";
- The Investment Manager, Lazard Freres and Company, is the fiduciary that Manages the assets of the Plan;
- The Plan Actuary, Alexander and Alexander, computes the retirement benefits for all retired employees of AGA;
- **The Plan provides that the "Authority of each named fiduciary shall be exclusive".**

Under ERISA principles, an employee benefit plan's Administrator, Trustee, Investment Manager, or Actuary may be fiduciaries. The District Court herein found that AGA did not act in any of these capacities. Based upon the District Court's findings, it is clear that AGA, the corporate employer, is not a "fiduciary" under ERISA. Indeed, in the case cited by Petitioner for this proposition, the corporate employer was found *not* to be a fiduciary under ERISA. *Boyer v. J.A. Majors Co. Employees' Profit Sharing Plan*, 481 F.Supp. 454 (N.D. Ga. 1979). As in the *Boyer* case, the administration of AGA's Plan was vested in a committee appointed by its Board of Directors. The District Court herein found that the AGA Plan specifically designates AGARC as the "Plan Administrator". There is no factual basis for Petitioner's assertion that AGA is a fiduciary. Accordingly, no grounds exist for review by this Court of the Court of Appeals' conclusion that "it was the committee, and not AGA, which was the fiduciary". (Pet. App., p. C-7).

AGARC (the Plan Administrator under the express terms of the Plan as found by the District Court) at one point was a defendant in this case; however, Petitioner stipulated to dismiss it with prejudice on November 18, 1988. Accordingly, Petitioner's claim that AGA is a "fiduciary" within the meaning of ERISA can be viewed as an attempt to avoid the effects of her own actions below. *See Leonelli v. Pennwalt Corp.*, 887 F.2d 1195 (2d Cir. 1989) (ERISA claim barred by failure to name Pension Administrative Committee as defendant).

Furthermore, Petitioner's references to AGA's Board of Directors are beside the point: they were never named as defendants. *Cf.*, 29 U.S.C. Section 2509.75-8(D-4) (setting forth limited circumstances under which individual members of an employer's board of directors may be considered fiduciaries).

In addition, Congress did not intend for the fiduciary duty provisions of ERISA to apply to an employer whose participation in its employee benefit plan is limited to sponsorship and funding. This is the case because a fiduciary under ERISA is vested with a duty of care and must carry out his duties "with respect to a plan solely in the interest of the participants and beneficiaries and . . . for the exclusive purpose of . . . providing benefits to participants and their beneficiaries . . . ". 29 U.S.C. Section 1104(a)(1). Congress recognized that to impose such standards on an employer whose participation was limited to sponsorship and funding would create intractable conflict-of-interest issues. Only in truly exceptional cases can ERISA's fiduciary duty provisions be read to apply to an employer which sponsors an employee benefit plan,

circumstances which the Court of Appeals correctly decided do not exist herein.

CONCLUSION

The Petition's arguments misstate the findings of fact of the District Court and the legal issues resolved by the District Court and the Ninth Circuit Court of Appeals based upon long standing precedent. AGA respectfully submits that plenary review by this Court is unwarranted.

For the foregoing reasons, AGA respectfully submits that the petition for writ of certiorari should be denied.

Dated: September 12, 1990.

Respectfully Submitted,

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APPENDIX 1

CORRECTION OF TYPOGRAPHICAL ERROR IN APPENDIX A OF THE PETITION

1. Appendix A of the Petition, at page A-18 states in relevant part beginning the seventh line from the top of the page:

> Unless without waiting for a request, than its inaction does not constitute fraud.

This sentence as set forth in the District Court's tentative ruling states in relevant part:

> Unless **the union has an *affirmative* duty to investigate a member's claims** without waiting for a request, than [sic] its inaction does not constitute fraud. (emphasis added, underlining in the original)

APPENDIX 2

CORRECTION OF TYPOGRAPHICAL ERRORS IN APPENDIX B OF THE PETITION

1. Appendix B of the Petition, at page B-7, states in relevant part beginning the sixth line from the top of the page:

> 10. The Plan provides that, "The **Actuary** of each named fiduciary shall be exclusive, . . . " Plan, Paragraph 12.20(b).

This sentence as set forth in the District Court's Memorandum states in relevant part:

> 10. The Plan provides that, "The **Authority** of each named fiduciary shall be exclusive, . . . " Plan, Paragraph 12.20(b). (emphasis added)

2. Appendix B at pages B-19 and B-20 states in relevant part:

> Yet Court cannot discern how Petitioner can prove fraud or breach of duty or infliction of emotional distress without proving that her rights under the collective bargaining agreement were violated.

This sentence as set forth in the District Court's Memorandum, states in relevant part:

> Yet the Court cannot discern how Plaintiff can prove fraud or breach of duty or infliction of emotional distress without proving that **she had rights under the collective bargaining agreement and that her rights were violated.** (emphasis added)

3. Appendix B at page B-20 omitted the following paragraph from the District Court's Memorandum:

> **The decision whether to grant plaintiff leave to amend the complaint is within the sound discretion of the district court. Fed. R. Civ. P. 15; *Keniston v. Roberts*, 717 F.2d 1295 (9th Cir. 1983). In most cases leave to amend should be granted.**

Id. In this case, however, plaintiff has had considerable opportunity to allege non preempted state claims. As the present complaint indicates, any state claims will necessarily involve the existence and scope of the collective bargaining agreement. Any renewed claims that plaintiff purged of the collective bargaining language therefore would merely be en exercise in artful pleading. Allowing leave to amend therefore would be a waste of time and money for both parties. Under these circumstances, leave to amend is not warranted. 3 Moore's Federal Practice, ¶ 15.10 at 15-106.